

**STATE OF NEW MEXICO
ENVIRONMENTAL IMPROVEMENT BOARD**

IN THE MATTER OF PROPOSED NEW REGULATION,
20.2.50 NMAC – *Oil and Gas Sector – Ozone Precursor Pollutants*

No. EIB 21-27(R)

**WILDEARTH GUARDIANS’
CLOSING LEGAL ARGUMENTS**

WildEarth Guardians (“Guardians”), pursuant to the November 19, 2021 Procedural Order on Post-Hearing Process and the November 22, 2021 Amendment to Procedural Order on Post-Hearing Process, submits its Closing Legal Arguments for the rulemaking hearing held between September 14, 2021 and September 24, 2021 on the proposed ozone precursor pollutants rules.

INTRODUCTION

WildEarth Guardians presented testimony and evidence during the rulemaking for the proposed regulation 20.2.50 NMAC (“Part 50”) in support of three proposals Guardians recommends the New Mexico Environmental Improvement Board (“Board” or “EIB”) adopt to satisfy its obligation to prevent and abate air pollution in New Mexico. In the discussion below, Guardians’ presents its three proposals and explains the reasons and legal arguments that support their adoption by this Board.

As the Board considers adopting the proposed rules in Part 50 and Guardians’ proposed additions to it, the Board must give weight it deems appropriate to all facts and circumstances. Of the facts and circumstances that were presented during this rulemaking hearing, Guardians recommends the Board give significant weight to three in particular.

First, when considering the strength of the proposed rules, the Board should give weight to the seriously degraded state of air quality that has existed in New Mexico for the past five

years and persists to this day. As of the date Guardians filed its notice of intent to present technical testimony, New Mexico air quality monitors had recorded more than 70 exceedances of the federal health standard for ozone in 2021 alone. The federal health standard for ozone is 70 parts per billion (“ppb”), but in 2021 ozone concentrations in New Mexico were recorded as high as 89 ppb.

Second, the Board should give weight to the unprecedented oil and gas boom in New Mexico and its impacts on both air quality and the State of New Mexico’s capacity to administer the programs necessary to oversee and regulate this industrial boom. For example, the New Mexico Environment Department’s (“NMED”) witness, Cindy Hollenberg, testified that NMED receives, on average, 475 notices of intent applications, per year, for the construction of, predominantly, oil and gas facilities.¹ Ms. Hollenberg also presented testimony that NMED’s 13 full-time enforcement and compliance staff simply cannot accomplish the inspections and other compliance reviews required by EPA, in NMED’s Compliance Monitoring Strategy (“CMS”).² What has emerged in this void of oversight is the discovery of widespread, systemic violations of air pollution control laws and regulations by New Mexico oil and gas facilities.³ Ms. Hollenberg’s testimony describes a disturbing number of oil and gas equipment leaks, improperly operating flares, and unlit flares that NMED, in coordination with EPA, identified by flyover surveillance between 2019 and 2020.⁴ The under-staffed and under-resourced Enforcement and Compliance Section’s capacity, or lack thereof, to ensure full compliance with the proposed rules, amidst the surge of oil and gas development in the state, should carry great weight as the Board considers the proposed rules.

¹ NMED Rebuttal Exh. 14 at 6.

² *Id.* at 4-5.

³ *Id.* at 6-7.

⁴ *Id.* at 7.

Third, the Board should give weight to the common-sense wisdom that a variety of everyday New Mexicans shared during the rulemaking hearing last September, which can help the Board cut through some of the technical jargon and complexity of the proposed rule and center the Board's deliberation on the heart of this matter. Among the many thoughtful comments, Guardians notes retired elementary school teacher, Karen Bonime, who described the serious costs of asthma on the children she taught and her concern with the link between ozone pollution and asthma.⁵ Ms. Bonime testified that whatever the cost to industry of pollution controls, human health has no price.⁶ From his tiny garden in Las Cruces, David Patterson expressed frustration at how the oil and gas industry uses the revenue it contributes to the state budget as a cudgel or bribe to prevent decisionmakers from enacting meaningful pollution regulations.⁷ Finally, Reverend Lynne Hinton, Director of the New Mexico Conference of Churches, testified that we do not inherit the planet from our ancestors, instead we borrow it from our children.⁸

As the Board considers the proposed rules, it should give special weight to the current degraded state of air quality in many parts of New Mexico, the oil and gas boom that has significantly strained the staff and resources in NMED's Compliance and Enforcement Section, and the many thoughtful comments New Mexicans from across the state shared during the rulemaking hearing.

⁵ EIB 21-27(R) Transcript Volume 5, 1403: 20-25, 1404: 1-14. Citations to the hearing transcript through the remainder of this filing are abbreviated as "TR" for Transcript followed by volume, page, and line numbers.

⁶ *See id.* at 1405: 23-24.

⁷ TR4 1091: 8-11.

⁸ *Id.* at 1095: 24-25, 1096: 1-3.

STANDARD OF REVIEW

In the context of air quality, the Board's overarching obligation to the people of New Mexico is to prevent and abate air pollution. NMSA 1978, § 74-2-5.A. To accomplish this, the Board adopts air quality rules pursuant to its authority under Section 74-2-5.A of the Air Quality Control Act ("AQCA"). Any air quality rules adopted by the Board must be *at least as stringent* as the requirements in the Federal Clean Air Act. *See* §§ 74-2-5.D.(1), G.

If the Board determines that emissions from sources within its jurisdiction cause or contribute to ozone concentrations in excess of 95% of the primary ambient air quality standard ("NAAQS") for ozone, the Board must adopt a plan, including rules, to control emissions of oxides of nitrogen ("NOx") and volatile organic compounds ("VOCs") to provide for attainment and maintenance of the standard. § 74-2-5.C. In adopting such rules, the Board must give weight it deems appropriate to all facts and circumstances, including:

- 1) the character and degree of injury to or interference with health, welfare, visibility and property;
- 2) the public interest, including the social and economic value of the source and subjects of air contaminants; and
- 3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

§ 74-2-5.F.

Rules adopted by the Board must be supported by substantial evidence in the record. § 74-2-9.C.

CLOSING LEGAL ARGUMENTS

GUARDIANS' PROPOSED CHANGES⁹

I. The Board Should Adopt Regulations to Ensure that Ozone Precursors Emitted During the Oil and Gas Well Drilling Phase are Accounted for in Air Quality Permits

Guardians' Proposal:

20.2.50.7 DEFINITIONS: In addition to the terms defined in 20.2.2. NMAC – Definitions, as used in this Part, the following definitions apply.

LL. “Potential to emit (PTE)”: means the maximum capacity of a stationary source to emit an air contaminant under its physical and operational design. The physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and a restriction on the hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation is federally enforceable. The PTE for nitrogen dioxide shall be based on total oxides of nitrogen. For wellhead sites, calculation of PTE shall include non-mobile source emissions that may occur prior to commencement of operation.

Guardians proposes to include a sentence in the definition of “potential to emit” (“PTE”) to clarify that air contaminants, including ozone precursors, emitted from stationary sources at oil and gas wellhead sites are subject to NMED regulation and must be reported and included in the calculation of PTE. Oil and gas well drilling and well completion are the initial processes that occur in the chain of oil and gas production, transmission, and distribution.¹⁰ Air contaminants, including ozone precursors, are typically emitted during this phase of oil and gas production from stationary sources, such as the wellbore.¹¹ Although the Independent Petroleum Association of New Mexico’s (“IPANM”) witness, Mr. Blewitt, attempted to minimize the emission of air

⁹ Guardians’ proposed changes are reflected below as against NMED’s most recent, December 16, 2021, version of its ozone precursor rule proposal. Proposed materials to be deleted are indicated by ~~bold strikethrough (red font)~~ and proposed new language is indicated by bold underlining (blue font).

¹⁰ Kinder Morgan Opening Statement at 7.

¹¹ TR4 1134: 19-23. No party in this rulemaking disagreed that ozone precursors are emitted during wellsite construction.

pollution at the wellhead site, nothing in his testimony or in the law exempts emissions released from stationary sources during wellhead site construction from being reported to NMED and controlled pursuant to the AQCA.¹²

A primary impetus for Guardians' proposal was a report titled *Impacts of Oil and Gas Drilling on Indigenous Communities in New Mexico's Greater Chaco Landscape* ("Chaco Report"), produced in collaboration with the UCLA Institute of the Environment and Sustainability. The Chaco Report identifies examples of oil and gas operators in New Mexico's San Juan Basin drilling wells prior to obtaining an air quality permit.¹³ In other words, the report found that for some oil and gas facilities a gap existed between construction of the wellhead site and the issuance date of the air quality permit for that facility, in which air pollutants may be emitted but not otherwise accounted for in air quality permits.¹⁴ Absent an air quality permit, facilities that emit ozone precursors during the drilling of oil and gas wells, for example, are uncontrolled, unregulated, and represent a cost to air quality and public health that is paid for by New Mexicans, instead of by operators. While the Chaco Report did not evaluate New Mexico oil and gas facilities statewide for this gap in air quality permitting, it is unlikely the gap would exist only in the San Juan Basin, especially considering testimony from NMED's witness, Cindy Hollenberg. Ms. Hollenberg explained that the Department has identified widespread compliance issues with oil and gas facilities throughout the state, and that the Department's Enforcement and Compliance Section is challenged by being regularly short-staffed and unable to conduct timely inspections for all New Mexico oil and gas facilities.¹⁵

¹² TR5 1324: 23-25, 1325: 1.

¹³ See WG Exh. 21; see also TR4 1134: 2-25, 1135: 1-14.

¹⁴ WG Exh. 21 at 16.

¹⁵ TR2 526: 25, 527: 1-19, 531: 6-10, 533: 22-23; 557: 22-25, 558: 1-7.

Although NMED’s witness, Michael Baca, was concerned that the Chaco Report had not been peer-reviewed, Mr. Baca did not testify that the report’s conclusion – that some oil and gas facilities are drilled without an air quality permit regulating the emissions from these operations – was mistaken or that this gap in regulatory oversight does not exist. Moreover, Mr. Baca seemed to be applying a standard to the Chaco Report that he did not similarly apply to the reports relied on by the Department. For example, neither NMED nor Mr. Baca presented testimony or evidence indicating that NMED’s Ozone Advance Path Forward had been peer reviewed. In fact, NMED only submitted its Ozone Advance Path Forward to EPA for review and approval in September 2021, and EPA had not concluded its review or approved the plan at the time Mr. Baca and NMED relied on it for purposes of this rulemaking hearing.¹⁶

Mr. Baca also expressed concern that Guardians’ proposal “could be taken” to expand NMED’s jurisdiction. However, Mr. Baca agreed that NMED has jurisdiction to regulate stationary sources of ozone precursors.¹⁷ Moreover, Mr. Baca did not direct the Board to any statute or regulation that precluded NMED from regulating stationary sources that emit ozone precursors during wellsite construction.¹⁸ As discussed above, Guardians’ proposal would simply make explicit NMED’s existing jurisdiction to regulate ozone precursors emitted from stationary sources during wellsite construction, and that these emissions must be accounted for in the calculation of PTE for the oil and gas facilities subject to the proposed Part 50.

¹⁶ See NMED Amended Exh. 4 at 1.

¹⁷ TR5 1346: 6-9.

¹⁸ See NMED Rebuttal Exh. 22.

II. The Board Should Ensure New Oil and Gas Facilities that Would Cause or Contribute to Ozone Levels above 95% of the NAAQS are Not Permitted

Guardians' Proposal:

20.2.50.112 GENERAL PROVISIONS:

A. General requirements

(12) In permitting a stationary source subject to this Part pursuant to 20.2.72, 20.2.74, or 20.2.79 NMAC, the department shall deny any application for a permit or permit revision, including any general permit registration, where construction or modification will cause or contribute to air contaminant levels in excess of ninety-five percent of any primary National Ambient Air Quality Standard for ozone. Compliance with this Part does not demonstrate that a stationary source will not cause or contribute to exceedances of any National Ambient Air Quality Standard or New Mexico ambient air quality standard.

Guardians proposes to add a standard to the proposed regulations that prohibits air quality permits or permit revisions for oil and gas facilities that would cause or contribute to ozone levels that exceed 95% of the National Ambient Air Quality Standard. The people of New Mexico, through the state legislature, directed the Board to prevent air quality in the state from exceeding 95% of the NAAQS for ozone, and for good reason. § 74-2-5.C. High levels of ozone pollution have serious health consequences for New Mexicans and especially for children, the elderly, and those with existing vulnerabilities like asthma, allergies, and other respiratory disease.¹⁹ Moreover, high levels of ozone also risk costly regulatory burdens for New Mexico, as NMED's witness, Michael Baca, explained.²⁰ Violations of the ozone NAAQS in New Mexico could lead the EPA to designate portions of the state as "nonattainment areas" – a designation that carries with it additional regulatory burdens.²¹

¹⁹ See 85 Fed. Reg. 87256, 87268-87275; see also NMED Exh. 1 at 2.

²⁰ TR1 352: 3-17.

²¹ *Id.*

Although the Part 50 rules proposed by NMED will hopefully help to restore air quality in southeast and northwest New Mexico to below 95% of the NAAQS for ozone, there is no guarantee the rule will achieve this, particularly as oil and gas production and development continues to boom in the state.²² Moreover, it will take years in some cases before the new requirements of the rule are fully implemented. For example, full implementation of the requirements for non-emitting pneumatic controllers will not be complete until January 2030.²³ Full implementation of the new rules is not guaranteed either, considering the widespread and systemic compliance issues NMED has identified at oil and gas facilities throughout the state and the Department's under-staffed Compliance and Enforcement Section.²⁴ Between now and the hoped-for full implementation of the proposed rules, New Mexicans will continue to suffer the impacts of respiratory disease, asthma, and allergies caused or exacerbated by high levels of ozone pollution. Considering all this, the Board should adopt Guardians' proposal because it would help prevent air quality in New Mexico's most ozone-burdened communities from further deteriorating in the interim period in which the proposed Part 50 is implemented, if approved, and due to the continued oil and gas boom in New Mexico.

New Mexico law and regulation already prohibit air quality permits for facilities that would cause or contribute to exceedances of the ozone NAAQS. This is a fundamental and well-established component of New Mexico air pollution law as well as the Clean Air Act's framework for addressing and preventing harmful air pollution. As such, both NMED and oil and gas operators have long-standing and established practices and processes for addressing this legal requirement.

²² TR1 352: 21-25; *see also* WG Exh. 14.

²³ Proposed Part 20.2.50.122, December 16, 2021 Version.

²⁴ TR2 526: 25, 527: 1-19, 531: 6-10, 533: 22-23; 557: 22-25, 558: 1-7.

Guardians derived its proposal from NMED's existing and fundamental authority under New Mexico law and the Clean Air Act to deny air quality permits for facilities that would cause or contribute to exceedances of the ozone NAAQS. *See e.g.* § 74-2-7.C.(1)(b); *see also* 20.2.72.208D. NMAC. Guardians tailored its proposal to meet the New Mexico Legislature's directive to prevent ozone levels from exceeding 95% of the NAAQS. NMED's witness, Mr. Baca, testified that he does not support Guardians' proposal because it would be different, in some ways, to how the Clean Air Act currently authorizes emissions from air polluting facilities,²⁵ but that's the whole point of this rulemaking – the way the Clean Air Act currently authorizes air pollution is not adequately protecting New Mexicans from ozone.²⁶ In response to deteriorating air quality, the people of New Mexico directed this Board to view the Clean Air Act as a starting point – not an end in itself – for the regulations needed to protect public health in the state. *See* § 74-2-5.D.(1) (“Rules adopted by the environmental improvement board or the local board may: (1) include rules to protect visibility in mandatory class I areas to prevent significant deterioration of air quality and to achieve ambient air quality standards in nonattainment areas; provided that *the rules shall be at least as stringent as required by the federal act* and federal regulations pertaining to visibility protection in mandatory class I areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas...”)(emphasis added).²⁷ This approach promulgated by the New Mexico Legislature was a response to circumstances unique to New Mexico, such as the oil and gas boom, which warrant regulations that differ from and exceed the baseline set by the Clean Air Act.²⁸ The Board should

²⁵ *See* TR5 1590: 4-14.

²⁶ *See* NMED's Statement of Reasons, No. EIB 21-27 (R) at 7.

²⁷ *See id.* at 4-5.

²⁸ *Id.* The statute requiring this Board to develop new rules to control ozone precursors, in the case of a determination that air quality exceeds 95% of the NAAQS for ozone, is another example of how New Mexico air quality law can and does differ from the Clean Air Act.

incorporate Guardians' proposal to achieve the Legislature's objective to prevent ozone from exceeding 95% of the NAAQS and begin to restore air quality in the interim period, when the proposed Part 50 rules, if approved, have not been fully implemented.

Mr. Baca and 3 Bear Delaware Operating – NM, LLC's witness, Lori Marquez, expressed concern that Guardians' proposal could impact NMED's workload for facilities permitted as minor facilities or under the General Construction Permit, but these concerns ignore this Board's minor facility precedent. According to this Board, minor facilities and facilities permitted under the General Construction Permit for oil and gas facilities by definition do not cause or contribute to exceedances of the NAAQS for ozone in the Permian Basin.²⁹ As Guardians' witness, Jeremy Nichols, testified, under Guardians' proposal, permits for these facilities would only be prohibited, if NMED concluded that they would cause or contribute to ozone levels in excess of 95% of the NAAQS.³⁰ Contrary to Mr. Baca's and Ms. Marquez' claims, approval of Guardians' proposal would not impact NMED's workload, given this Board's prior rulings regarding minor sources.

Mr. Baca and Ms. Marquez also opined that Guardians' proposal was outside the scope of the rulemaking, but the statute governing this rulemaking and the stated purpose of the rulemaking noticed to all interested parties do not preclude Guardians' proposal from being considered by the Board. When ozone concentrations are determined to be in excess of 95% of the NAAQS, the New Mexico Legislature directed this Board to adopt "a plan, including rules, to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard." § 74-2-5.C. Guardians' proposal prohibiting facilities emitting ozone precursors that would cause or contribute to ozone concentrations in

²⁹ See TR5 1589: 6-20.

³⁰ *Id.* at 1518: 7-12.

excess of 95% of the NAAQS for ozone falls well within this legislative directive. Furthermore, the public notice for this rulemaking more than adequately notified interested parties of the purpose and scope of this rulemaking, sufficiently placing interested parties on notice of rule proposals such as the one proposed by Guardians. The public notice states: “The purpose of the public hearing is for the Board to consider and take possible action on a petition by the New Mexico Environment Department (“NMED”) requesting the Board to adopt a plan, including proposed new regulations at 20.2.50 NMAC...The proposed regulations at Part 50 would reduce emissions of ozone precursor pollutants (oxides of nitrogen and volatile organic compounds) from sources in the oil and gas sector located in areas of the State within the Board’s jurisdiction that are experiencing elevated ozone levels.”³¹ Guardians’ proposal to reduce emissions of ozone precursors by prohibiting facilities that cause or contribute to ozone concentrations in excess of 95% of the NAAQS falls squarely within the scope of this rulemaking.

Finally, Mr. Baca also claimed that the AQCA and the Board’s regulations limited the grounds on which the Department can deny permits for oil and gas facilities, and that Guardians’ proposal would be inconsistent with these limitations. However, Mr. Baca acknowledged that the Department may deny an air quality permit that fails to comply with any statute or rule pursuant to the AQCA.³² Mr. Baca also admitted that if the Board were to approve Guardians’ proposal, it would become a rule pursuant to the AQCA, pursuant to which the Department could deny an air quality permit.³³ Accordingly, Guardians’ proposal, if approved, would be consistent with the rules governing the Department’s authority to deny permits.

³¹ NMED Exh. 112 at 3.

³² TR5 1599: 2-19; *see also* § 74-2-7.C(1)(a) (stating “...the department or the local agency may deny any application for: (1) a construction permit if it appears that the construction or modification: (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act...”).

³³ TR5 1599: 21-24.

III. The Board Should Ensure that Deviations from the Proposed Rules are Reported to NMED

Guardians' Proposal:

20.2.50.112 GENERAL PROVISIONS:

D. Reporting requirements:

(1) The owner or operator shall submit records of all monitoring events documenting deviations of this Part to the department. For excess emissions, reports shall be submitted in accordance with 20.2.7 NMAC. For all other deviations, reports shall be submitted semi-annually beginning January 1, 2022 and shall be submitted by the 30th day of the month following the end of each semi-annual period.

(2) In addition to any reporting requirements specified in the applicable sections in this Part, the owner or operator shall respond within three business days to a request for information by the department under this Part. The response shall provide the requested information for each source subject to the request by electronically submitting a CDR to the department's Secure Extranet Portal (SEP), or by other means and formats specified by the department in its request. If the department requests a CDR from multiple facilities, additional time will be given as appropriate.

(3) The owner or operator shall comply with all applicable reporting requirements at 20.2.7 NMAC.

Guardians proposes that the Board adopt provisions that require owners and operators to submit records that document deviations or noncompliance with monitoring and other requirements set forth in the proposed Part 50 regulations. While New Mexico already requires owners and operators of oil and gas facilities to self-report excess emissions to NMED pursuant to 20.2.7 NMAC, Guardians' proposal would require operators to report deviations from the work practice standards and other requirements in Part 50, beyond excess emissions.

The regulations proposed by NMED in Part 50 include, for example, a variety of new monitoring requirements that seek to prevent excess emissions from happening in the first place. For instance, the proposed Part 50 regulations would require operators of the largest oil and gas

facilities to conduct, at minimum, weekly external audio, visual, and olfactory inspections of various facility components to prevent equipment leaks before excess emissions occur.³⁴ The objective of this rule provision – to prevent excess emissions – cannot be achieved unless operators actually comply with the monitoring requirements. As a result, NMED’s proposed Part 50 also requires operators to maintain records of their compliance with monitoring requirements like these. However, under NMED’s current rule proposal, operators are not required to report these records to NMED unless specifically requested.³⁵ Guardians’ proposal would simply require that when operators record instances of deviations or noncompliance with requirements of Part 50, operators must report this to NMED on a semi-annual basis.

NMED’s witness, Ms. Hollenberg, testified at length about how important it is for NMED to receive reports and data indicating compliance issues at oil and gas facilities.³⁶ As discussed above, understaffing at the Compliance and Enforcement Section is a constant problem and particularly so since 2019.³⁷ As a result, NMED cannot conduct all the inspections of oil and gas facilities that are legally required throughout the year.³⁸ Absent sufficient inspection capacity, Ms. Hollenberg testified that NMED has and will continue to rely on self-reported compliance data to ensure operators are complying with the rules.³⁹ Without this compliance data, NMED’s Compliance and Enforcement staff would have far less information to identify

³⁴ Proposed Part 20.2.50.116C.(1), December 16, 2021 Version.

³⁵ Proposed Part 20.2.50.112A.(3), December 16, 2021 Version (stating “Within two years of the effective date of this Part, owners and operators of a source requiring equipment monitoring, testing, or inspection shall develop and implement a data system(s) capable of storing information for each source in a manner consistent with this section.”).

³⁶ TR2 530: 23-24 (testifying “Reliance on self-reporting is integral to the Bureau’s compliance and enforcement strategy.”).

³⁷ TR2 558: 2-7 (testifying “I would say that – that we do – we have had a significant number of vacancies since at least 2019. In 2019, at that point I was inspections manager and we were fully staffed at seven inspectors, and that didn’t last very long. So, yes, there are resource constraints on an ongoing basis.”).

³⁸ TR2 531: 6-8 (testifying “Well, it’s pretty clear that the Bureau does not have adequate staff to inspect every facility in New Mexico.”).

³⁹ TR2 531: 8-9.

serious violators and other compliance trends across the state.⁴⁰ As Ms. Hollenberg testified, NMED's proposed Part 50 already requires that operators *record* their compliance, or noncompliance, with the requirements in Part 50. However, under the current version of the proposed Part 50, operators are not required to *report* their deviations or noncompliance with Part 50 to the Department unless requested to do so. The Department's witness, Elizabeth Bisbey-Kuehn, admitted that as Part 50 is currently written, the Compliance and Enforcement Section would not receive any of this compliance data unless the Department specifically requested it.⁴¹ And as Ms. Hollenberg testified, NMED already lacks the staff necessary to conduct required facility inspections, much less request compliance reports for the thousands of oil and gas facilities across the state.

Guardians' proposal is a balanced approach that would provide NMED's Compliance and Enforcement staff critical information necessary to preventing excess emissions but without creating administrative burdens that NMED and operators are not already prepared to address. As discussed above, NMED's proposed Part 50 already requires operators to compile the compliance data that, under Guardians' proposal, would need to be reported to NMED. In addition, rather than require operators to report the entirety of that compliance data to NMED, Guardians' proposal only requires operators to report deviations, in other words noncompliance, with Part 50 to NMED. Operators of many oil and gas facilities currently self-report excess emissions pursuant to 20.2.7 NMAC, and NMED has been competently receiving that data for years now. A requirement obligating operators to report deviations or noncompliance with the

⁴⁰ TR2 543: 17-25, 544: 1-3 (testifying "So what this will help us do is gather the information that would be impossible for us to gather on our own. And the way that that will work, of course, remains to be seen, but without that information, just like if there were no excess emissions reporting required, we would have nothing to go on. This at least give us something to go on, so that when we do our required inspections, when we do our required reports reviews, we have more information that helps point us in the direction of where we need to really focus our efforts so that we can get to that level – level playing field as much as possible").

⁴¹ TR5 1376: 17-21.

provisions in Part 50 should, therefore, not be overly burdensome given established self-reporting tools and the fact that operators are already obligated under the proposed Part 50 rules to monitor and record this information.

Importantly, an operator that fully complies with Part 50 will have nothing to report to NMED according to Guardians' proposal, as NMED's witness, Mr. Baca, admitted.⁴² Guardians' proposal only requires owners and operators to report deviations to NMED. Despite Mr. Baca's admission, he testified that NMED would be overwhelmed by Guardians' reporting proposal.⁴³ Mr. Baca's concern about NMED being overwhelmed troublingly implies that he assumes New Mexico oil and gas operators will have significant noncompliance issues to report to NMED under the proposed Part 50 rules. But if New Mexico oil and gas owners and operators are not going to significantly comply with the rules proposed in Part 50, it is unclear why the Board, NMED, and other interested parties have undertaken this rulemaking exercise.

Mr. Baca also questioned the benefit of reporting the information contemplated in Guardians' proposal, but Ms. Hollenberg testified clearly that this type of compliance information is critical to NMED's ability to implement and enforce its air quality regulations, particularly given low staffing levels. Besides, Mr. Baca admitted that if he were a homeowner nearby an oil and gas facility failing to comply with provisions of Part 50, he would want to be aware of that noncompliance.⁴⁴ Many, if not all, New Mexicans likely share Mr. Baca's interest in being aware of noncompliance issues, but the general public would have no access to an operator's failure to comply with the monitoring, testing, and inspection requirements required by the proposed Part 50, unless operators reported it to NMED, thereby making the compliance

⁴² TR5 1596: 7-15.

⁴³ TR5 1592: 9-18.

⁴⁴ TR5: 1597: 22-25, 1598: 3.

data a matter of public record. Guardians' proposal ensures both NMED Compliance and Enforcement staff receive this information and ensures public access to the information.

Finally, in response to a question from counsel for the Gas Compressor Association, Mr. Baca agreed that any deviation that caused an excess emission would be reported to NMED through the current excess emission reporting requirements. However, as discussed earlier, the rules in proposed Part 50 are about more than reporting excess emissions – the proposed rules seek to ensure compliance with monitoring, testing, and inspection requirements that prevent excess emissions from occurring in the first place. Mr. Baca explained, himself, that with the new requirements in proposed Part 50, NMED is attempting to “address a gap between the excess emission reporting and [] reporting around deviations from, like I said, work practice standards or leak detection and repair, where you don’t necessarily have a quantitative excess emission you can report.”⁴⁵ Mr. Baca went on to testify that NMED wants to ensure that “there’s an added layer of reporting required so that the public has a complete picture around a source’s compliance status...”⁴⁶ But contrary to Mr. Baca’s testimony, under NMED’s proposal the public would not have a complete picture of an oil and gas facility’s compliance status unless and until NMED’s under-staffed Enforcement and Compliance Section finds the time to specifically request this information from the relevant operator(s). This is the crux of Guardians’ proposal – NMED and the public should have a complete picture of any and all oil and gas facilities that have compliance issues with the new requirements of Part 50, without having to spend the time and resources requesting this information.

⁴⁵ TR5 1551: 18-23.

⁴⁶ TR5 1551: 6-9.

CONCLUSION

For the foregoing reasons, the Board should adopt the changes proposed by Guardians described above, which are also presented in the document labeled Attachment A, included with this filing.

Dated: January 20, 2022

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CERTIFICATE OF SERVICE

I certify that on January 20, 2022 I filed and served the foregoing **WILDEARTH GUARDIANS' CLOSING LEGAL ARGUMENTS** by electronic mail to the following:

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ATTACHEMENT A:
WILDEARTH GUARDIANS' PROPOSED MODIFICATIONS
TO NMED'S PROPOSED 20.2.50 NMAC

TITLE 20 ENVIRONMENTAL PROTECTION
CHAPTER 2 AIR QUALITY (STATEWIDE)
PART 50 OIL AND GAS SECTOR – OZONE PRECURSOR POLLUTANTS

20.2.50.7 DEFINITIONS: In addition to the terms defined in 20.2.2. NMAC – Definitions, as used in this Part, the following definitions apply.

LL. “Potential to emit (PTE)”: means the maximum capacity of a stationary source to emit an air contaminant under its physical and operational design. The physical or operational limitation on the capacity of a source to emit an air pollutant, including air pollution control equipment and a restriction on the hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its design if the limitation is federally enforceable. The PTE for nitrogen dioxide shall be based on total oxides of nitrogen. For wellhead sites, calculation of PTE shall include non-mobile source emissions that may occur prior to commencement of operation.

20.2.50.112 GENERAL PROVISIONS:
A. General requirements

(11) In permitting a stationary source subject to this Part pursuant to 20.2.72, 20.2.74, or 20.2.79 NMAC, the department shall deny any application for a permit or permit revision, including any general permit registration, where construction or modification will cause or contribute to air contaminant levels in excess of ninety-five percent of any primary National Ambient Air Quality Standard for ozone. Compliance with this Part does not demonstrate that a stationary source will not cause or contribute to exceedances of any National Ambient Air Quality Standard or New Mexico ambient air quality standard.

D. Reporting requirements:
(1) The owner or operator shall submit records of all monitoring events documenting deviations of this Part to the department. For excess emissions, reports shall

be submitted in accordance with 20.2.7 NMAC. For all other deviations, reports shall be submitted semi-annually beginning January 1, 2022 and shall be submitted by the 30th day of the month following the end of each semi-annual period.

(2) In addition to any reporting requirements specified in the applicable sections in this Part, the owner or operator shall respond within three business days to a request for information by the department under this Part. The response shall provide the requested information for each source subject to the request by electronically submitting a CDR to the department's Secure Extranet Portal (SEP), or by other means and formats specified by the department in its request. If the department requests a CDR from multiple facilities, additional time will be given as appropriate.

(3) The owner or operator shall comply with all applicable reporting requirements at 20.2.7 NMAC.